Takaful Nasional Bhd v Nooraizan bt Mohd Tahir & Anor

HIGH COURT (KUCHING) — JUDICAL REVIEW NO 10 OF 2010-I
RAVINTHRAN JC
10 JANUARY 2012

Labour Law — Industrial Court — Jurisdiction — Whether Industrial Court's jurisdiction to hear case ceased because claimant abandoned prayer for reinstatement — Matter referred to Industrial Court by Minister under s 20(3) of the Industrial Relations Act 1967 — Reinstatement abandoned because claimant secured employment elsewhere — Whether Industrial Court derived jurisdiction from order of reference of Minister — Whether claimant dismissed without just cause or excuse

The first respondent ('Nooraizan') was employed by the applicant as manager of its Kuching branch on an extended probationary period at the end of which she was told she would not be confirmed as her performance had been poor. Nooraizan claimed her non-confirmation was unfair. She claimed the applicant had not appraised her performance or had done it unfairly. She said she was given an unrealistically high target to meet despite staff shortage and the fact that the product she was marketing was new. Her grievance came before the Industrial Court on reference by the Minister under s 20(3) of the Industrial Relations Act 1967 ('the Act'). The Industrial Court found her dismissal was without just cause or excuse as the reason of her alleged poor performance was unjustified. The court found the target Nooraizan had been given, which was 264% higher than the budget for the previous year, was unreasonable and unrealistic and a colourable exercise to have her removed. A 15% to 20% increase was the norm. The applicant was not able to produce any witness to explain the reason for such a high target and it was also found that as soon as Nooraizan had left the applicant's employ, the target set for her successor was revised down by 50%. In her application for the s 20 reference and her statement of case, Nooraizan had applied for reinstatement to her former position without loss of salary and other benefits. However, by the time the trial started three years later, she had obtained employment elsewhere. During the hearing she told the court she no longer wanted reinstatement and asked for compensation and back wages instead. The Industrial Court did not award her compensation but only granted her RM70,000 in back wages, equivalent to about 18 months' salary, for the period she was unemployed and underemployed. It did not award the full 24 months' back wages as she had worked for the applicant for only nine months. The applicant applied to the High Court to quash the Industrial Court's award, claiming, inter alia, that as Nooraizan had abandoned her claim for reinstatement, which was the only

remedy allowable under s 20 of the Act, the Industrial Court ceased to have jurisdiction to hear her case. The applicant also said it was management's prerogative to set performance targets for an employee.

Held, dismissing the application with costs:

(1) The Industrial Court derived its jurisdiction from the order of reference made by the Minister. The reference conferred threshold jurisdiction. The Industrial Court therefore had jurisdiction to enter into an enquiry whether the respondent was dismissed with just cause or excuse (see para 15).

(2) At the time she made the representations, the first respondent wanted reinstatement and pleaded to that effect in the statement of case. If it were otherwise, the Minister would not have referred her case to the Industrial Court for an award. Since the case was referred to the court under s 20(3), it could not be said the Industrial Court lacked jurisdiction (see para 15).

(3) The fact that the first respondent did not pursue reinstatement at the hearing before the Industrial Court as opposed to the time when she first made representation under s 20(1) to the Director-General, did not have the effect of bringing to an end the jurisdiction of the Industrial Court (see para 15).

(4) Even if it was the law that an employee could not claim compensation in lieu of reinstatement during the course of the hearing, the Industrial Court in the instant case did not commit any error of law as it did not grant reinstatement or compensation but only allowed her back wages on finding she was dismissed without just cause or excuse. The order to pay back wages was entirely proper (see paras 16 & 18).

(5) The Industrial Court did not commit any error of law in concluding the target set for the first respondent was unreasonable and unrealistic. The court had correctly directed itself that although production targets were the employer's prerogative but when challenged on the ground of reasonableness, the employer had to justify it (see paras 18–19).

(6) The quantum of back wages awarded was discretionary and reasonable in the circumstances (see para 25).

[Bahasa Malaysia summary

Responden pertama ('Nooraizan') diambil bekerja oleh pemohon sebagai Pengurus Cawangan Kuching atas tempoh percubaan yang dilanjutkan yang mana akhirnya dia diberitahu bahawa dia tidak disahkan sebagai pekerja memandangkan prestasi kerjanya memuaskan tidak. Nooraizan menuntut bahawa ketidaksahannya sebagai pekerja adalah tidak adil. Dia mendakwa pemohon tidak menilai prestasinya atau telah melakukannya secara tidak adil. Dia berkata dia diberi sasaran tinggi yang tidak realistik untuk dicapai

walaupun kekurangan pekerja dan fakta bahawa produk yang dipasarkannya adalah baru. Rasa tidak puas hatinya dikemukakan di hadapan Mahkamah Perusahaan atas rujukan Menteri di bawah s 20(3) Akta Perhubungan Perusahaan 1967 ('Akta'). Mahkamah Perusahaan mendapati pembuangan kerjanya adalah tanpa sebab dan alasan adil memandangkan alasan mengenai prestasi kerja tidak memuaskan yang didakwa tersebut tidak berjustifikasi. Mahkamah mendapati sasaran yang diberikan kepada Nooraizan, yang mana adalah 264% lebih tinggi daripada belanjawan untuk tahun lepas, adalah tidak munasabah dan realistik pelaksanaan yang tidak menentu untuk membuangnya. Tambahan 15% hingga 20% adalah yang menjadi kebiasaan. Pemohon tidak dapat mengemukakan mana-mana saksi untuk menjelaskan alasan untuk sasaran tinggi sedemikian dan ia juga didapati sebaik sahaja Nooraizan meninggalkan pekerjaannya, sasaran yang ditetapkan untuk penggantinya diturunkan sebanyak 50%. Dalam permohonannya untuk rujukan s 20 dan penyata kes, Nooraizan telah memohon untuk pengembalian kerja kepada jawatannya dahulu tanpa potongan gaji dan faedah-faedah lain. Walau bagaimanapun, apabila perbicaraan bermula tiga tahun kemudiannya, dia memperolehi pekerjaan di tempat lain. Semasa pendengaran dia memberitahu mahkamah yang dia tidak lagi memerlukan pengembalian kerja dan sebaliknya memohon untuk pampasan dan gaji kebelakangan. Mahkamah Perusahaan tidak mengawardkannya dengan pampasan tetapi memberikan dia gaji kebelakangan sebanyak RM70,000, bersamaan gaji 18 bulan, untuk tempoh yang dia tidak bekerja dan bekerja bukan dalam kapasitinya. Ia tidak mengawardkan gaji kebelakangan 24 bulan sepenuhnya memandangkan dia hanya bekerja untuk pemohon selama sembilan bulan sahaja. Pemohon memohon ke Mahkamah Tinggi untuk membatalkan award Mahkamah Perusahaan, mendakwa, antara lain, bahawa memandangkan Nooraizan telah menghentikan tuntutannya untuk pengembalian pekerjaan, yang mana satu-satunya remedi yang dibenarkan di bawah s 20 Akta, Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk mendengar kesnya. Pemohon juga menyatakan yang ia adalah prerogatif pengurusan untuk meletakkan sasaran prestasi untuk seseorang pekerja.

Diputuskan, menolak permohonan dengan kos:

(1) Mahkamah Perusahaan mendapatkan bidang kuasanya daripada perintah rujukan yang dibuat oleh Menteri. Rujukan memperuntukkan ambang bidang kuasa. Mahkamah Perusahaan oleh itu mempunyai bidang kuasa untuk memasukkan pertanyaan sama ada responden dibuang kerja dengan sebab dan alasan adil (lihat perenggan 15).

(2) Pada masa dia membuat representasi, responden pertama memohon untuk pengembalian pekerjaan dan memplidkan mengenainya di dalam penyata kes. Jika sebaliknya, Menteri tidak akan merujuk kesnya ke Mahkamah Perusahaan untuk award. Memandangkan kes dirujuk ke

mahkamah di bawah s 20(3), ia tidak dapat dikatakan yang Mahkamah Perusahaan tidak mempunyai bidang kuasa (lihat perenggan 15).

(3) Fakta bahawa responden pertama tidak meneruskan dengan pengembalian pekerjaan pada masa pendengaran di hadapan Mahkamah Perusahaan bertentangan dengan semasa dia mula-mula membuat representasi pertama di bawah s 20(1) kepada Ketua Pengarah, tidak memberi kesan untuk mengakhirkan bidang kuasa Mahkamah Perusahaan (lihat perenggan 15).

(4) Walaupun ia adalah undang-undang bahawa seseorang pekerja tidak boleh menuntut pampasan sebagai ganti pengembalian pekerjaan semasa perjalanan pendengaran, Mahkamah Perusahaan dalam kes ini tidak melakukan apa-apa kesilapan undang-undang kerana ia tidak memberikan pengembalian pekerjaan atau pampasan tetapi hanya membenarkan gaji kebelakangannya atas dapatan yang dia dibuang kerja tanpa sebab dan alasan adil. Perintah untuk membayar gaji kebelakangan secara keseluruhannya adalah betul (lihat perenggan 16 & 18).

(5) Mahkamah Perusahaan tidak melakukan apa-apa kesilapan undang-undang dalam memutuskan sasaran yang ditetapkan untuk responden pertama tidak munasabah dan realistik. Mahkamah secara betul mengarahkannya bahawa walaupun sasaran-sasaran pengeluaran adalah prerogatif majikan tetapi apabila dicabar atas alasan munasabah, majikan mestilah menjustifikasikannya (lihat perenggan 18–19).

(6) Kuantum gaji kebelakangan yang diawardkan adalah budi bicara dan munasabah dalam keadaan kes (lihat perenggan 25).]

Notes

For cases on jurisdiction of Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1676–1743.

Cases referred to

Borneo Post Sdn Bhd, The v Margaret Wong [2001] 8 CLJ 758, HC (folld)

Holiday Inn, Kuching v Lee Chai Siok Elizabeth [1992] 1 MLJ 230; [1992] 1 CLJ 230, HC (refd)

Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong & another appeal [2001] 4 MLJ 97, CA (refd)

Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493; [2006] 2 CLJ 501, CA (refd)

Minister of Labour and Manpower & Anor v Wix Corp South East Asia Sdn Bhd [1980] 2 MLJ 248, FC (refd)

Petrofibre Network (M) Sdn Bhd v Mohd Zulnaidi Mohd Razali & Ors [2010] 1 LNS 448, HC (refd)

Thilagavathy a/p Alagan Muthiah v Meng Sing Glass Sdn Bhd & Anor [1997] 3 MLJ 735, HC (refd)

A *Warren J Carey v Coca-Cola Far East Ltd (Malaysian Branch) & Anor* [2010] 1 LNS 1474, HC (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20, 20(1), (3), 29(d), 30(6), 54, 54(2)

B *Gordon Tang (Tang Legal Practice) for the applicant.*
See Chee How (Baru Bian & Co Advocates) for the first respondent.

Ravinthran JC:

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[1] This is a judicial review application to quash the decision of the Industrial Court in Kuching in Award No 1184 of 2010 which was handed down on 14 September 2010. The brief facts of the case are as follows.

D BRIEF FACTS

[2] The first respondent was employed as the Kuching Branch Manager of the applicant on 17 December 2002. She was put on six months' probation. At the end of the six months probation period, she was not confirmed in her post. The applicant extended her probation by another three months, ie until 17 September 2003. However, on 9 September 2003, the applicant informed her that she would not be confirmed. She was told that the management was not satisfied with her performance.

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[3] The first respondent's case before the Industrial Court was that the applicant had not appraised her performance or had done it unfairly. She said that there was lack of discussion with her about her appraisal. In short, the applicant had ulterior motives for removing her from employment. She said that the applicant had fixed unrealistically high targets for her to achieve. She said that the targeted budget set for the Kuching branch that she headed was RM9.5m whereas the previous year's actual production was RM3.611m. The applicant did not consider that there was staff shortage during her probation period and that the product she was marketing was new.

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[4] The applicant's defence before the Industrial Court was that the first respondent was not confirmed because she had performed poorly during her initial six months' probation period and the extended three months' probation period.

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DECISION OF INDUSTRIAL COURT

[5] The learned chairman firstly found that the first respondent was dismissed from employment. This finding was made notwithstanding the fact

that the first respondent had reached the end of her probation period and her employer found her unfit for confirmation on the ground of poor performance. In my opinion, the learned chairman correctly concluded there was dismissal. In *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong & another appeal* [2001] 4 MLJ 97 which was cited by him, the Court of Appeal endorsed the following statement of law from the judgment of the learned chairman in that case:

> As to the first element, industrial jurisprudence as developed in the course of industrial adjudication, readily recognises that any act which has the effect of bringing a contract of employment to an end is a dismissal within the meaning of s 20 of the Act. The terminology used and the means resorted to by an employer is of little significance; thus contractual terminations, constructive dismissals, non-renewals of employment contracts, forced resignations and retrenchments are all species of the same genus which is dismissals. Retirement, likewise, is also a dismissal for the purpose of industrial adjudication under s 20 of the Act.

[6] Therefore even a probationer who is not confirmed in his post on the ground of poor performance can be treated as dismissed from employment. The learned chairman then considered the question whether the dismissal was without just cause or excuse. He acknowledged that it is for the employer to set its own production targets. However, he held that where the target that is set is unrealistically high, the court is duty bound to inquire how they were set. He found that the target set for the first respondent was 264% higher than the actual budget for the previous year instead of the usual 15%–20% increase. He found it unreasonable. He was also of the opinion that the main witness for the applicant, the assistant vice-president ('COW1') could not explain the increase because the first respondent was not answerable to him. The first respondent was answerable to the branch operations manager. The branch operation manager was not called as a witness because he had left the company. However, the learned chairman noted that no evidence was led to show whether any efforts were made to call him as a witness. Lastly the chairman also noted that as soon as the first respondent left the employ of the applicant, the targets set for her successor was revised downwards by 50%.

GROUNDS OF JUDICIAL REVIEW APPLICATION

[7] The principal grounds of the applicant to quash the decision of the Industrial Court are as follows:

(a) that s 54(2) of the Industrial Relations Act 1967 was contravened;

(b) that the first respondent did not seek reinstatement and therefore the Industrial Court lacked jurisdiction; and

(c) the target set for an employee is a management prerogative.

[8] The other grounds are:

(a) that the chairman erred in concluding that there was 'observable lack of communication between the headquarters and the claimant'; and

(b) that the chairman erred in concluding that the first respondent did not get support from the human resource department of the applicant.

APPROACH OF REVIEW COURT

[9] In the instant case, the reason given by the applicant for not confirming the first respondent was that she has performed poorly throughout her probation period. This was stated in the letter dated 9 September 2003. The task of the Industrial Court was to determine whether the allegation was true and if so, whether it constituted just cause or excuse for dismissal. In instant case, the Industrial Court determined that the allegation of poor performance is not justified as the target set for the first respondent was unreasonably high and that her failure to achieve them did not provide just cause or excuse for the applicant not to confirm her. I am mindful that this court is not exercising appellate jurisdiction. It is exercising supervisory review jurisdiction. In the premises, the decision of the Industrial Court should not be disturbed unless it is not supported by evidence or if the Industrial Court had taken irrelevant considerations or omitted relevant considerations or had committed a material error of law on which the decision depended. I shall gratefully adopt the following guidelines given in the case of *Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493; [2006] 2 CLJ 501 by the Court of Appeal:

(i) judicial review is not an appeal from a decision but a review of the manner in which the decision was made;

(ii) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;

(iii) the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;

(iv) the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal;

(v) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law; and

(vi) the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

However if an error of law is committed or some relevant factor is not considered or some irrelevant factor is taken into consideration, the decision of the Industrial Court can be examined for substance as an inferior tribunal has no discretion to commit an error of law (*Anisminic v Foreign Compensation Commission* [1969] 2 AC 147).

[10] I shall now examine the grounds of the applicant.

[11] The first ground is that s 54(2) of the Industrial Relations Act 1967 was contravened by the Industrial Court. Section 54(2) enacts as follows:

54 Exclusion of evidence as to certain matters

(1) Where a trade dispute relates to matters as to which negotiation or conciliation proceedings have taken place under this Act, no evidence shall be given in the proceedings before the Court as to such negotiation or conciliation proceedings other than a written statement in relation thereto agreed to and signed by the parties to the dispute.

(2) In a proceeding before the Court on a reference to the Court under section 20 (3), no evidence shall be given of any proceeding before the Director General under section 20 (2) other than a written statement in relation thereto agreed to and signed by the parties to the reference.

(3) No evidence shall be given in proceedings before the Court with regard to any offer relating to any matter connected with the trade dispute made without prejudice by any person or trade union except with the consent of that person or trade union.

(4) The exclusion specified in subsections (1), (2) and (3) shall also be applicable in any proceedings before any other court.

[12] The complaint of the applicant is that the Industrial Court admitted the first respondent's letter dated 13 November 2003 in evidence during hearing. The said letter was addressed to the Pegawai Perhubungan Perusahaan Kuching to give her version of the events some two months after her service was terminated. In the statement of case, she referred to this letter. She also attached the letter to the statement of case. During the hearing before the Industrial Court, counsel for applicant applied to expunge the part of the witness statement that referred to the said letter. The learned chairman overruled the

objection because he was of the opinion that the letter does not contain anything that had transpired during the conciliation proceedings. In any event, the learned chairman observed that the allegations in the said letter were repeated by the first respondent in her court testimony. Counsel for applicant cited the case of *Minister of Labour and Manpower & Anor v Wix Corp South East Asia Sdn Bhd* [1980] 2 MLJ 248 where the Federal Court said as follows:

> The use of the words 'any proceeding' in the provision in reference to the steps taken by the Director-General must be taken to be in the loose and not judicial sense and must also be taken to give him the option whether or not to have such proceeding. In any case what should be noted in the provision is that since the legislature has deemed it fit to exclude as evidence such proceeding from the Industrial Court, it should also be excluded from other courts. This provision should indicate that the courts should not be concerned with what transpired at the conciliation proceeding and where there is no settlement they need only concern themselves with that fact.

[13] It must be noted that in the above passage, the Federal Court was only concerned with keeping out evidence that transpired in the conciliation proceedings. I agree with the learned chairman that the aim of ensuring confidentiality of conciliation proceedings is to assure the parties that they are free to make concessions, admissions and offers to settle a case without being worried that the other side may use it to their detriment during trial. In other words s 54 is aimed at promoting conciliation proceedings. In the instant case, however, the said letter only contains the version of the first respondent in respect of events that led to her dismissal. It has nothing to do with the events that transpired in the failed conciliation proceedings. In the premises, the prejudicial effect of the letter is probably nil or negligible as found by the Industrial Court. Even if it is accepted that the said letter was caught within the ambit of s 54, to my mind, it is not an error of law that affected the decision of the Industrial Court. The learned chairman was mindful that the disclosures in a conciliation proceeding are not admissible.

[14] The second ground is that the first respondent did not seek reinstatement during the proceedings before the Industrial Court. In her application for a reference under s 20 and the statement of case, the first respondent applied to be reinstated to her former position without loss of salary or other benefits. However, more than three years had elapsed before the trial started and by that time the first respondent was gainfully employed at another insurance company. She candidly told the Industrial Court that she did not desire reinstatement with her former employer in view of the strained relationship. Instead of reinstatement, she applied for compensation. Counsel for applicant submitted that s 20 allows for one remedy only, ie reinstatement and therefore the Industrial Court was no longer invested with jurisdiction to hear the claim. In support of this proposition, she cited the case of *Holiday Inn, Kuching v Lee Chai Siok Elizabeth* [1992] 1 MLJ 230; [1992] 1 CLJ 230. In

that case, Haidar J held that the Industrial Court no longer had any jurisdiction to hear the dispute when the claimant gave evidence that she did not want reinstatement to employment with her former employer. This case was recently followed in *Petrofibre Network (M) Sdn Bhd v Mohd Zulnaidi Mohd Razali & Ors* [2010] 1 LNS 448. A contrary view was expressed by Dennis Ong J in *The Borneo Post Sdn Bhd v Margaret Wong* [2001] 8 CLJ 758. In that case, the claimant did not even specifically pray for reinstatement in the statement of case but prayed for 'any other order the court deems fit and proper in the circumstances'. Dennis Ong J held as follows in dismissing the argument that the Industrial Court lacked jurisdiction because of the failure of the claimant to specifically pray for reinstatement:

> The omission in the statement of the case to state it as a specific relief does not affect the jurisdiction of the Industrial Court to hear and determine the case on the merits: see s 29(d) of the Act 177. The Industrial Court derives its jurisdiction from the order of reference by the minister made under s 20(3) of the Act 177 and which such court must exercise, so it was held in *Assunta Hospital v Dr A Dutt* [1981] 1 MLJ 115 (FC).

[15] In the instant case, due to the lapse of time of three years, the first respondent is gainfully employed elsewhere. At the time she made the representations, she wanted reinstatement and pleaded to that effect in the statement of case. If it were otherwise, the Minister would not have referred her case to the Industrial Court for an award. Since the case was referred to the Industrial Court for award under s 20(3), it cannot be said that the Industrial Court lacked jurisdiction. I shall respectfully follow the view expressed in *The Borneo Post Sdn Bhd v Margaret Wong* and hold that the jurisdiction of the Industrial Court derived from the order of reference made by the Minister. This reference confers threshold jurisdiction. Therefore, the Industrial Court was invested with jurisdiction to enter into an inquiry whether the respondent was dismissed with just cause or excuse. As I had said earlier, in the instant case, the first respondent had applied for reinstatement. If the Industrial Court was not empowered to award compensation in lieu of reinstatement and it had done so, it would have committed an error of law that affected its decision. However, it cannot be said that the Industrial Court lacked jurisdiction in view of the reference by the Minister. In my view, the fact that the first respondent did not pursue reinstatement at the hearing before the Industrial Court as opposed to the time when she first made representation under s 20(1) to the Director General, did not have the effect of bringing to an end the jurisdiction of the Industrial Court. The scheme of the Industrial Relations Act 1967 has actually envisaged that by the time the Industrial Court adjudicates and delivers its award, reinstatement may not be the appropriate remedy. This is the reason s 30(6) provides as follows:

> (6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).

[16] This provision empowers the Industrial Court to avoid ordering reinstatement if it thinks it is not necessary or expedient. In all probability, in cases such as the instant one where the claimant is already gainfully employed elsewhere, the Industrial Court would not make an order for reinstatement. In the premises, it should make no difference to the jurisdiction of the court, if the aggrieved employee had candidly stated that he or she does not fancy reinstatement. Assuming I am wrong and that it is the law that an employee cannot claim compensation in lieu of reinstatement during the course of the Industrial Court hearing, on the fact of this case, I am of the view that it is not an error of law on which the decision of the Industrial Court depended. My reasons are as follows. In the instant case, the first respondent claimed compensation and back wages. As the first respondent was employed for only nine months, the Industrial Court declined to order compensation. The Industrial Court ordered only backwages for the period the first respondent was unemployed and underemployed. The first respondent was initially unemployed. Later she became a telemarketer and also earned some income by selling satay.

[17] Compensation and backwages are not the same thing. The court has the power to award backwages even if the primary remedy of reinstatement or compensation is granted. The rationale for backwages was explained in the case of *Thilagavathy a/p Alagan Muthiah v Meng Sing Glass Sdn Bhd & Anor* [1997] 3 MLJ 735 as follows:

> Because of the powers given by s 30 of the Act — in particular, sub-s (6) thereof — the Industrial Court could instead make an order of compensation in lieu. But, whether or not the court makes the award, ie by an order of reinstatement or an order for compensation in lieu, the issue of back wages is a separate matter altogether. It is an issue, though related to the fact of dismissal without just cause or excuse, that is not dependent on the type of order to be made upon the finding of dismissal without just cause or excuse. Once it is determined that a workman has been dismissed without just cause or excuse, generally for his absence from the place of employment from the time of dismissal to the time of reinstatement or the time of the order for compensation in lieu thereof, he must be paid wages in full as though he was working for the employer during the period. It was not his fault that he was away from work during the period. It was because of the wrongful act of the employer in dismissing him without any just cause or excuse.

[18] As noted earlier, the Industrial Court did not grant compensation in this case. It did not grant reinstatement either as the first respondent did not wish to go back to work for the applicant. However, the Industrial Court made a finding that the first respondent was dismissed without just cause or excuse. Therefore, the order to pay backwages was entirely proper. In the premises, even if the argument of counsel for the applicant that a claimant cannot ask for compensation in lieu of reinstatement is correct, in point of fact, the Industrial Court did not make any order of compensation and therefore did not commit any error of law. I therefore find no merit in the second ground.

[19] The third ground is that the Industrial Court has transgressed into the sphere of management prerogative. The Industrial Court found that the target of RM9.5m that was set for the first respondent was unreasonable and unrealistic. In short, the setting of an unreasonable target was a colourable exercise to remove her. The learned chairman came to this conclusion for the following reasons. The actual target that was achieved in the previous year was only RM3.611m. Therefore, the target set for the first respondent who was a probationer was a massive increase of 264%. When the first respondent failed to achieve the said target, the applicant terminated her service although she was among the top performers in the country. When her successor took over the Kuching branch, the target set for him was immediately reduced by 50%. The first respondent testified that the target was set at a meeting by a senior officer by the name of Nasharudin who was not called as a witness. The first respondent said that she had verbally complained that the target was too high but was told 'to try first'.

[20] She also said that higher targets were set because the applicant was 'pushing fast'. The Industrial Court Chairman fully accepted the principle that production targets are generally the prerogative of the employer. However, he correctly stated that where there is a challenge or in other words an accusation that the target constituted a colourable device to remove an employee, the Industrial Court was duty bound to inquire how the target was set. He examined the evidence pertaining to the setting of the targets for the various branches of the applicant with a tooth comb and discovered one salient fact. According to the assistant vice president (COW1) who was the principal witness for the applicant, the targets are set after taking into account the trading of a particular branch, the business potential of the particular State and the previous year's performance. He said generally, 'an incremental ratio of 15% to 20% would be followed'. However, when the witness was questioned why the target of the Kuching branch was increased by 264% the witness merely answered that the 15% to 20% increment did not apply across the board and some branches have higher percentages. However, he never produced the target set for other branches for a comparison to be made. The witness also agreed that if the target that was set for the first respondent was only a 15% increase

from the actual production from the previous year, her achievement would have been 107%. It is for the above reasons that the learned chairman concluded that the target set for the first respondent was unreasonable. In my opinion, the learned chairman did not commit any error of law in coming to this conclusion.

[21] He had correctly directed himself that production targets are the employer's prerogative but when challenged on ground of unreasonableness, they must justify it. In the instant case, the learned chairman had considered the evidence and made a finding of fact that they were unreasonable and unrealistic. I see no reason to interfere with this finding in the exercise of my review jurisdiction as he did not commit any error of law and he took into account relevant considerations and did not take into account irrelevant considerations. Counsel for the applicant's argument that a production target can never be questioned by the Industrial Court because it is a management prerogative is not tenable. If that was the law, all that an employer needs to do to get rid of an employee unjustly and with impunity is to set a ridiculously high and unachievable target.

OTHER GROUNDS

[22] Counsel for the applicant submitted that the learned chairman erred in concluding that there was 'observable lack of communication between the headquarters and the claimant'. Counsel for the applicant submitted that the Industrial Court had not taken into account the company memoranda issued to her to improve her performance. The context within which the Industrial Court made the above observation is as follows. The assistant vice president made the following statement when questioned what he had done to improve the performance of the first respondent:

Answer: Gave her a reminder to buck up.

Sent her a memo reminding her of her performance and telling to achieve her budget

[23] The learned chairman further observed that such an action was not a 'comforting response'. Given the context of the statement, it is obvious that the decision of the learned chairman did not solely turn on the observation that there was lack of communication between the employer and employee. In the premises, it cannot be said the learned chairman committed an error of law by wrongly assessing the evidence.

[24] The final ground was that the learned chairman had stated that the first respondent did not get support from the human resource department of the applicant. The Kuching branch was short of two staff at the material time. The first respondent told the Industrial Court that it was the duty of the headquarters to recruit replacement staff. The assistant vice president had insisted that it was the duty of the first respondent as branch manager. The first respondent testified that she had raised the issue of replacement staff with the senior officers of the applicant on numerous occasions which included the branch manager's meetings. The learned chairman noted that the minutes of these meetings were not produced by the applicant. She had also sent e-mails to the headquarters. However, she was unable to produce them as she has left the company. The first respondent also testified that she had made effort to recruit two experienced marketing staff. The learned chairman accepted her evidence that she had made effort to recruit replacement staff regardless of whether it is the duty of the applicant or the first respondent. This is a finding of fact and there is no reason for it to be interfered with as there is no palpable error in the conclusion of the learned chairman. In any event, it is only a peripheral issue considered by the chairman in his ultimate conclusion that the first respondent had been dismissed without just cause or excuse.

[25] As the Industrial Court had not committed any error of law or had not taken into account irrelevant considerations or had omitted relevant considerations, the judicial review application should be dismissed. Counsel for first respondent had in his final submission urged this court to consider punitive or exemplary damages and higher damages. The Industrial Court awarded RM70,000 in backwages which is roughly equivalent to 18 months salary. The court did not award the full 24 months backwages for the reason that the first respondent had worked for only nine months. It also did not award any compensation for dismissal. I see no reason to interfere with the award. The quantum of backwages is discretionary and in my view reasonable in the circumstances. In respect of the failure to award exemplary or punitive damages, it is a matter of discretion of the Industrial Court (see *Warren J Carey v Coca-Cola Far East Ltd (Malaysian Branch) & Anor* [2010] 1 LNS 1474). In any event, no compelling grounds for the award of exemplary or punitive damages were furnished to the Industrial Court.

[26] In conclusion, I shall dismiss the claim for judicial review with costs of RM20,000.

Application dismissed with costs.

Reported by Ashok Kumar